82-1686

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ISMENE M. KALARIS,
Administrative Appeals Judge, and
JULIUS MILLER,
Administrative Appeals Judge,
Petitioners,

v.

RAYMOND J. DONOVAN,
Secretary of Labor,
MALCOLM R. LOVELL, JR.,
Under Secretary of Labor, and
ROBERT L. RAMSEY,
Chief Administrative Appeals Judge,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[redacted] BRIEF OF AMICI CURIAE

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BRIEF OF AMICI CURIAE

INTEREST OF THOMAS C. FITZHUGH, III AND STEPHEN M. VAUGHAN

Amici curiae are attorneys licensed to practice law in the State of Texas, and each has practiced in that state in the City of Houston for the past several years. During

that period, much of their practice has been involved in cases arising under the Longshoremen's and Harbor Workers' Compensation Act (hereafter LHWCA), 33 U.S.C. 901 *et seq.*, and its various extensions.[1]

Amicus Fitzhugh has been involved exclusively in defense of claims brought under the LHWCA by representing employers, insurance carriers, and self-insured employers. *Amicus* Vaughan's experience has been primarily concerned in representing claimants. Therefore, *amici curiae* have been involved on both sides of such proceedings and are often adversaries in cases arising under the LHWCA.

Due to their extensive experience *amici curiae* have in regard to the operation of the LHWCA, and each has participated several times as lecturers to national conferences on the LHWCA, and each is recognized as a legal expert in that area of the law. *Amici curiae* have a compelling interest in the orderly administration of claims under the LHWCA. *Amici curiae* strongly contend that public policy reasons support the Petitioners in this case.

Petitioners have cogently presented to the Court the statement of the case, the questions presented, and have set forth the jurisdiction of this Court, along with the Constitutional provisions, statutes, and regulations involved in this matter. *Amici curiae* fully agree with the propositions presented by Petitioners for granting review

1. Defense Base Act, 42 U.S.C. § 1651 *et seq.* (1976 and Supp. IV 1980); Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 *et seq.* (1976 and Supp. V 1981); Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (1976 and Supp. IV 1980); District of Columbia Workers' Compensation Act, 36 D.C. Code § 501 *et seq.* (1981).

in this case. However, significant factors which impact *amici curiae* and others involved in the daily administration of claims arising under the LHWCA should be considered in the resolution of this controversy by this Court.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I.

The Decision Below Denies Party Litigants Under the LHWCA Due Process of Law

The decision below stands for the proposition that Administrative Appeals Judges of the Benefits Review Board can be summarily dismissed without cause or without a hearing. If this decision stands, it will render the Administrative Appeal Judges accountable solely to the Secretary of Labor.[2] Allowing the Secretary (hereafter "the Secretary") such direct influence over the Benefits Review Board deprives litigants before the Board (which often includes the Secretary) of the fair and impartial consideration of their cases in this judicial setting guaranteed them by the Due Process Clause.

The LHWCA extends benefits to a vast and varied group of American workers. In addition to Longshoremen and shipyard workers, the Act, through its extensions, applies, inter alia, to the members of the peacekeeping force in the Sinai desert, to civilian employees of defense contractors working abroad, to most of the workers drilling for oil and gas on the outer continental shelf, to commissary and club employees on all United States

2. *Kalaris v. Donovan*, 697 F.2d 376, at 388, n.45; at 391, n.60; at 397, n.87 (D.C. Cir. 1983).

military bases, and to the workers of the District of Columbia.[3] The financial impact of the LHWCA is likewise significant. For example, a 23 year-old offshore worker earning $1,000 per week, if totally and permanently disabled, would receive more than $7,291,795 if he lived to his projected life expectancy.[4] If his wife (same age) survived his death and lived her normal life expectancy, she could receive an additional $1,878,318 in compensation benefits alone.[5] The LHWCA would also provide the injured worker with medical treatment for life,[6] and an allowance for funeral benefits would be paid upon his death.[7] The value of the claims that could be filed by this one offshore worker approaches $10 million. With hundreds of thousands of employees covered by the LHWCA, the impact of biased decisions from the Benefits Review Board can readily be seen.

At oral argument, Judge Wald questioned the government's counsel regarding the government's position. Specifically, she asked whether the Secretary could remove Board members following rendition of a decision the Secretary considered unacceptable. The government's attorney responded that the Secretary would have that power. Judge Wald then asked if the Secretary could direct Board members to reach a certain result prior to hearing a case. Again the government's attorney indicated that the Secretary should have this power. The opinion of the court below leaves no doubt that the Secretary, by utilizing the

3. *Id.*

4. 33 U.S.C. § 908(c)(21), § 910(f).

5. *Id.*, § 909(b), § 910(f).

6. *Id.*, § 907.

7. *Id.*, § 909(a).

power to remove, has the direct power to influence the decisions of the Benefits Review Board.[8] Thus, the Benefits Review Board, as viewed by the court below, has no independence, but is simply an extension of the Secretary. In reaching this conclusion, the court specifically did *not* decide the due process problem that would arise from claims of unfairness made by parties litigating before the Board.[9]

Amici curiae, on the other hand, are directly affected, as are their clients, by the potential unfairness in such a situation.

The Secretary of Labor, through his delegatee, the Director, OWCP, has the right by statute and by regulation to participate in proceedings before the Benefits Review Board.[10] As a result of the court below's decision, the Secretary also has the right to control the outcome of decisions of the Board. The bias in this arrangement is patent and obvious. The situation created by these results should not be allowed to stand. It is more egregious than the system which the Ninth Circuit found denied due process in *United Farm Workers of America, AFL-CIO v. Arizona Agricultural Employment Relations Board*, 696 F.2d 1216 (9th Cir. 1983).

The Arizona Agricultural Employment Relations Board (AERB)[11] was composed of members appointed by the

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8. "[W]e find that Congress did not intend to make the Board independent of the Secretary [of Labor]." *Kalaris v. Donovan*, 697 F.2d 376, 381; 391, n.60 (D.C. Cir. 1983).

9. *Id.* at 399, "The removed members have not raised and could not raise due process allegations here because they cannot be subject to potential unfairness in adjudication the process protects against." n.91.

10. *E.g.*, 20 C.F.R. § 702.147(b).

11. ARIZ. REV. STAT. ANN. §§ 23-1386 to 23-1391 (Supp. 1981).

governor. The state act specified that two members would be appointed as representatives of employers, two would represent unions, and three would represent the general public. The United Farm Workers contended the composition of the AERB was unconstitutional in that having employer representatives on the AERB would make them biased against the United Farm Workers and deprive it of an impartial tribunal in any cases it might bring to the board. The Ninth Circuit held the state act unconstitutional on its face "because we conclude that the act's requirement that the AERB contain members who represent labor and employer interests deprives parties of the impartiality required of the due process clause."[12] Relying on *Tumey v. Ohio*, 273 U.S. 510 (1927), the court concluded:

> "[T]hat unconstitutional bias exists whenever favoritism or animosity toward a party, or purely personal interests of the decision maker, *might* tempt the decision maker to decide on the basis of his feelings toward a party or his purely personal interests." (Footnote omitted). (Emphasis supplied).[13]

The scheme struck down by the Ninth Circuit involved a board composed of a variety of interests, any one of which might have been biased. The composition of the Benefits Review Board, as interpreted by the court below, is far more invidious in its potential for abuse. In the scheme resulting from the decision below, not only is the Secretary permitted to retain his role as an advocate before the Board, but he is freely allowed to dictate the

12. 696 F.2d at 1219.

13. *Id.* at 1220.

decision of the Board, regardless of its impact on other parties.

This Court has frequently interpreted the 1972 Amendments to the LHWCA.[14] In those cases, it has permitted the Director, OWCP, to participate in the arguments of the cases before it.[15] In some instances, the Director directly opposed the result reached by the Board, and in other circumstances the Director supported the Board's decisions.[16] This clearly demonstrates that the interests of the Director have not in the past been synonymous with the decisions of the Board. However, should the decision reached below stand, these interests would become synonymous, as Board members would have the "sword of Damocles"[17] hanging over their head should they decide cases contrary to the position set out by the Director and adopted by the Secretary.

The Court of Appeals overlooked its own carefully drawn distinction concerning impartiality for rulemaking purposes and impartiality for adjudicatory purposes created in *Association of National Advertisers v. FTC.*[18]

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14. E.g., *Director, OWCP v. Perini N. River Assocs.*, ___U.S. ___, 103 S.Ct. 634 (1983); *United States Industries v. Director, OWCP*, 455 U.S. 608, 102 S.Ct. 1312 (1982); *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268 (1980); *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979); *Director, OWCP v. Rasmussen*, 440 U.S. 29 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

15. *Id.*

16. *Id.*

17. *Wiener v. United States*, 357 U.S. 349, 356 (1958). *See also* K. Davis, *Administrative Law of the Seventies* (1976), § 1.09 at 13-14.

18. 201 U.S. App. D.C. 165, 627 F.2d 1151 (1979), *cert. denied*, 447 U.S. 921 (1980).

There is no dispute that the Benefits Review Board is purely an adjudicatory body. The court below also ignored its holding in *Cinderella Career and Finishing Schools v. FTC*[19] in which it held that the test for disqualification in an adjudicatory proceeding was:

> "Whether a disinterested observer may conclude that [the agency] had in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[20]

Such advance judgment of the facts and laws by the judges of the Benefits Review Board, as mandated by the Court below, is precisely the situation created by the Court of Appeals decision. *Amici curiae* stand before the Court to represent those parties who will participate in claims before the Benefits Review Board and who will not have an impartial tribunal to adjudicate their disputes.

The fundamental principle of the decision below is that the Secretary of Labor can dictate the results of cases to be decided by the Benefits Review Board. This is constitutionally impermissible, and the decision below adversely affects the rights of the litigants before the Board to an impartial hearing and to the due process of law afforded by the Constitution of the United States.[21]

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19. 138 U.S. App. D.C. 152, 425 F.2d 583 (1970).

20. *United Farm Workers of America, AFL-CIO v. Ariz. Agr. Empl. Rel. Bd.*, 696 F.2d 1216, 1221 (9th Cir. 1983).

21. United States Constitution, 5th Amendment.

II.

The LHWCA As Construed Violates The Due Process Clause.

This Court discussed due process requirements in enforcing a federal statute in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). Writing for an unanimous court, Justice Marshall concluded:

> "The due process clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. The requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and that promotion of participation affected individuals in the decision-making process. [Cit. omitted] The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. [Cit. omitted] At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.' *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring), by insuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. *The requirement of neutrality has been jealously guarded by this Court.*"[22] (Emphasis supplied.)

The interpretation of the Act given by the court below creates an impermissible and biased situation in the administration of the Act. The Act gives the Secretary,

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22. 446 U.S. at 242.

who has delegated the authority to the Director, Office of Workers' Compensation Programs, the right to participate in proceedings before the Board. This right has been further recognized by the Courts of Appeals as an absolute right of the Director, as the Secretary's delegatee, to intervene in cases that involve interpretation of the Act, *e.g., Ingalls Shipbuilding v. White,* 681 F.2d 275 (5th Cir. 1982); *Shahady v. Atlas Tile & Marble Co.,* 673 F.2d 479 (D.C. Cir. 1982). This Court has frequently discussed the status of the Director as a proper party in litigation. Most recently this issue was addressed in *Director, OWCP v. Perini North River Assocs.* (hereafter *"Churchill"*).[23]

III.

The LHWCA As Construed Violates The Separation of Powers Doctrine.

In *Churchill* the Court discussed situations in which the Director, OWCP, and the Benefits Review Board took differing views of important questions involving interpretation of the LHWCA.[24] The recognition of such differing views is strong evidence that this Court considers the Board independent of the Director. If, as the court below suggests, the Benefits Review Board is nothing but an extension of the Secretary, this Court and other appellate courts could not become involved in deciding disputes between the Director and the Benefits Review Board, for to do so would be to involved in deciding disputes between the Director and the Benefits Review Board for to do so would be to inject the judicial system into the midst of an administra-

23. ____U.S.____, 103 S.Ct. 634 (1983).

24. *Id.*, at 640, n.11.

tive squabble among officers of the same cabinet department. The fact that this Court's opinion in *Churchill* was published eight days after the court below's decision may be viewed as effectively vitiating the interpretation of the relationship of the Benefits Review Board to the Secretary of Labor contained in that decision. The court below's position would place the Secretary not only as a participant in litigation through the Director, OWCP's office, but would also allow him to be the judge of his own issues by directly influencing the decisions of the Board. The party litigants—the injured workers, their employers and insurers, the parties whose financial (i.e. property) rights are at issue—would be mere spectators to Board actions and would have the results dictated without any independent adjudication of the issues in their various cases.

If such a situation existed, there would be no standing for the Director to appeal decisions of the Board he considered adverse, nor would any justiciable controversy be presented to any court for resolution. One office inside the Department of Labor would simply be disagreeing with another office inside the Department of Labor, all under the control of the Secretary. This cannot be the result Congress intended. Nor, as one surveys the cases which have developed under the amended statute, can one conceive such results were contemplated or considered by any of the courts which have faced the issue squarely. However, that result is the only outcome if the decision below is permitted to stand.

The decision below has prompted a series of lawsuits by parties involved in LHWCA litigation.[25] These suits

25. *Hudson v. Donovan,* No. G-83-31, S.D. Texas, Galveston Div'n; *Church v. Donovan,* Civil No. H-83-70, D. Conn.; *Silliman v. Donovan,* No. C-830991RPA, N.D. Cal.

challenge the attempted removal of the appellants on grounds that such action violates the due process rights of party litigants who appear before the Benefits Review Board. By granting the writ in this case, the Court could effectively terminate additional litigation on this point and could conclusively establish the rights of party litigants to a fair and unbiased hearing before the Benefits Review Board. More importantly, if litigants lose confidence in the impartiality of the Benefits Review Board, appeals of its decisions to the overloaded Courts of Appeals and to this Court will inevitably increase.

IV.

The Decision Below Conflicts With The LHWCA And Decisions Of Other Circuit Courts Construing That Statute.

In legal proceedings, the Benefits Review Board has been treated as a separate entity from the Secretary of Labor.[26] The Secretary, acting through the Director, OWCP, has participated in proceedings before the Board advocating the views of the Secretary. On several occasions the Director, dissatisfied with the decision of the Board, has petitioned for review in the Circuit Courts of Appeals.[27] In some circuits the Director has been given automatic standing to participate in appeals from decisions of the Benefits Review Board. *Viz., Ingalls v. White,* 681 F.2d 275 (5th Cir. 1982); *Shahady v. Atlas Tile & Marble Co.,* 673 F. 2d 479 (D.C. Cir. 1982); *Director, OWCP v. Eastern*

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26. *See* notes 13-15, *supra.*

27. *E.g., Ingalls v. White,* 681 F.2d 275 (5th Cir. 1982); *Shahady v. Atlas Tile & Marble Co.,* 673 F.2d 479 (D.C. Cir. 1982).

Coal Corp., 561 F.2d 632 (6th Cir. 1977); *Underhill v. Peabody Coal Co.*, 637 F.2d 217 (7th Cir. 1982).

In *Director, OWCP v. Rasmussen*, 440 U.S. 29 (1979), the Director disagreed with the Benefits Review Board's position that death benefits were not subject to maximum compensation limits contained in the Act. The Court of Appeals and this Court agreed with the Benefits Review Board, rejecting the arguments of the Director.

The court below views the Board as not independent of the Secretary. However, this Court in *U. S. Industries v. Director, OWCP*, ____U.S.____, 102 S.Ct. 1312 (1982), *Rasmussen, supra*, and most recently in *Churchill* has viewed the Board as independent of the Secretary and of the Director.

The District of Columbia Circuit now clearly conflicts with the view of the Ninth Circuit, which has held; "neither the Secretary of Labor nor the OWCP can dictate to the Benefits Review Board the manner in which the [Act] should be interpreted . . . nor [can the Secretary determine] the outcome of [the claims] process." *Boating Industries Association v. Marshall*, 601 F.2d 1376, 1382 (9th Cir. 1979). Such a result is strengthened by reference to the terms of the statute itself. Section 921(b)(4) states that:

> the Board *may*, on its own Motion *or at the request of the Secretary*, remand a case to the hearing examiners for further appropriate action. *The consent of the parties in interest shall not be a prerequisite to a remand by the Board.* (Emphasis supplied.)[28]

28. 33 U.S.C. § 921(b)(4) (1976 and Supp. V. 1981).

The court below acknowledged that this section was germane to determining "whether the Board is free from substantive agency oversight or review."[29] However, the court below was concerned with the Article III *vel non* status of the Benefits Review Board judges and not with the due process rights of party litigants.[30]

CONCLUSION

To permit the Secretary of Labor to remove a majority of the Benefits Review Board without cause and without a hearing is to permit the Secretary to directly influence the Board and its decision making process. Such a move, which is not countenanced by the statute, directly interferes with the rights of party litigants to a fair and impartial adjudication of their disputes by the Benefits Review Board. The sword of Damocles hangs over the head of Board members and, as the court below indicated, will render them totally susceptible to the direction of the Secretary. Thus party litigants are left to appeal to a kangaroo court, one in which the Secretary not only appoints the judges, but participates as a party in interest and then dictates the results. This is hardly justice and certainly not the due process to which party litigants are entitled.

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29. *Kalaris v. Donovan*, 697 F.2d 376, 388, n.45 (D.C. Cir. 1983).

30. *Id.*, 697 F.2d at 399, n.91.

WHEREFORE, PREMISES CONSIDERED, *amici curiae* respectfully request the Court to grant the Petition to the Court of Appeals, to reverse its judgment, and then affirm the judgment of the District Court.

Respectfully submitted,

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